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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

D.D., Respondent, v. R.C., Appellant.	B284239 (Los Angeles County Super. Ct. No. 17TRRO00048)

APPEAL from an order of the Superior Court of Los Angeles County, Gary Tanaka, Judge. Reversed.

Jeffrey Lewis for Appellant.

Olsen & Olsen and Casey A. Olsen for Respondent.

INTRODUCTION

Disputes between two neighbors and their wives resulted in the issuance of a civil harassment restraining order. The restrained party raises a plethora of appellate issues, including the sufficiency of the evidence on each of the factual predicates required for the issuance of a restraining order, along with First Amendment challenges to the scope of the injunction. We decide the case on much narrower grounds, finding insufficient evidence the complained-of harassment actually caused substantial emotional distress to the party that sought and obtained the restraining order. That failure of proof necessitates reversal of the order.

FACTUAL BACKGROUND

We begin by summarizing the evidence adduced at the evidentiary hearing. D.D. and C.D. are married and reside on the Palos Verdes peninsula. C.D. was a registered nurse before a substance abuse problem led to her being charged with a drug-related felony, and subjected to disciplinary proceedings by the California Board of Registered Nursing. The felony charge against C.D. was eventually dismissed, such that she has no felony conviction. She served time on house arrest, but did not spend any time in jail.[1]

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[1] Both D.D. and R.C. have filed requests to augment the record, or in the alternative for judicial notice, asking that we consider additional facts beyond those adduced at the evidentiary hearing. These include certified pleadings from the Board of Registered Nursing proceeding against C.D. and information about the disposition of her criminal case. "Augmentation does not function to supplement the record with materials not before

R.C. and his spouse J.C. live in a home across the street from D.D. and C.D. The parties appear to have lived in relative harmony, or at least tolerated one another, for several years until matters began to unravel in July 2014.

A. July 2014

On July 3, 2014, C.D. sent a two line e-mail to R.C. asking, "hey, everything good?" as she perceived that R.C. was giving her "the cold shoulder . . . . perhaps [sic] I am just sensitive and if so sorry and all good." The following day, R.C. responded with a two page single spaced e-mail, in which he discussed various neighbors (some of whom he described charitably, others of whom he called "law breaking" and "unethical"). R.C. accused C.D. of "saying horrible things about me," "maligning . . . my character and reputation," and "slander[ing] me to others" in the neighborhood. R.C. mentioned he heard from another neighbor that C.D. had been convicted of a drug-related felony and sentenced to jail, and that she had a "problematic family situation," both of which he had been willing to forgive but that he was now "done with [her] duplicity." Shortly after sending

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the trial court. [Citations.] Reviewing courts generally do not take judicial notice of evidence not presented to the trial court. Rather, normally 'when reviewing the correctness of a trial court's judgment, an appellate court will consider only matters which were part of the record at the time the judgment was entered.' " (*Vons Companies, Inc. v. Seabest Foods, Inc*. (1996) 14 Cal.4th 434, 444, fn. 3.) No exceptional circumstances exist here that would justify deviating from that rule, and the requests are denied. Because the parties discuss sealed criminal records concerning C.D., we have separately granted D.D.'s request to maintain the confidentiality of those records through redactions of the parties' briefs. (Cal. Rules of Court, rule 8.46.)

this e-mail, R.C. forwarded a copy of it to C.D.'s husband D.D. R.C. said he wanted D.D. to understand the self-restraint R.C. had exhibited for years, that R.C. understood his e-mail might mean the two men could no longer interact, and that "Though not my preference, I cannot imagine the pain and suffering you would endure should you be deemed to be friends with 'the enemy.'"

J.C. testified that shortly after this e-mail, C.D. trespassed onto to property of R.C. and J.C., peered into their windows, and screamed at them. C.D., on the other hand, testified she approached R.C. when he was standing in his driveway to explain the felony charge was dismissed and that she did not serve time in jail, and to request he "talk to her like a human being and not send . . . horrible emails." According to C.D., R.C. closed his driveway gate and went into his home, leaving C.D. trapped inside the fence surrounding R.C. and J.C.'s property. Lacking a cellphone, C.D. yelled to be let out and walked around the property until she found an unlocked gate through which she could leave.

B. August 2014

J.C. testified that in August 2014, she was walking in the neighborhood when C.D. drove down the street past her, made a U-turn, and then drove close to J.C. with a "crazed look in her eyes" before speeding away. C.D. testified she often drove down the street in question but at a reasonable rate of speed, and had no idea what J.C. was talking about.

C. November 2014

J.C. asserted that while out for a walk in November 2014, C.D. blocked J.C.'s path with C.D.'s car. J.C. testified C.D. got out of the car and confronted her, that J.C. asked to be left alone

but C.D. kept talking to her, and that after telling C.D. to stop talking J.C. ran home. C.D., for her part, testified she saw J.C. without her husband and wanted to speak with J.C. "as a human being, because I really hated the hostility in the neighborhood." When J.C. asked C.D. not to speak to J.C., C.D. said she responded "okay" and "that was it."

D. February 2015

J.C. asserted that on February 3, 2015, while walking by C.D.'s home with J.C.'s new baby, C.D. approached J.C. along with a child for whom C.D. was caring and asked to see J.C.'s newborn. J.C. said she told C.D. they were not having anyone see the baby today; C.D. testified J.C. said the baby was not available for viewing and threw a blanket over the child to hide it. J.C. claims C.D. then called her a "f**king a**hole"; C.D. claims she told her child companion "they just don't like me" and did not use any profanity.

After this encounter, R.C. sent an e-mail to D.D. captioned "Restraint of C.D." R.C. accused D.D. of disregarding or disrespecting R.C.'s July 4, 2015 e-mail, and asked D.D. to "find a way to restrain your wife from interacting with any member of my family." R.C. asked D.D. to apologize to R.C. on C.D.'s behalf, and recounted J.C.'s version of the events in July, August, and November 2014 as well as earlier on February 3, 2015. R.C. warned that if D.D. did not restrain C.D. from interacting with R.C.'s family or slandering R.C., the consequences would be "serious."

D.D. responded that same day, "Message received. Congrats on baby." D.D. testified he did not confront R.C. about the e-mail or dispute R.C.'s version of events because D.D. hoped

the issue would go away, and R.C.'s conduct seemed to escalate when he was aggravated.

E. May 2016

1. May 5, 2016

On May 5, 2016, R.C. e-mailed D.D. to complain that C.D. continued to harass R.C.'s family, including making critical comments about R.C. to others. R.C. said if there were any future harassing incidents by C.D., that would prove D.D. was unable or unwilling to thwart C.D.'s actions and would lead to "an immediate legal or perhaps social consequence."

2. May 21, 2016

J.C. testified that when shopping in the neighborhood supermarket, C.D. approached her and began talking. J.C. asked C.D. not to speak to her, but C.D. responded that she could talk to whomever she wanted. J.C. walked away and left the store. C.D. recalled the interaction differently. C.D. testified she saw J.C. at the supermarket. When C.D. said good afternoon, J.C. responded with an outburst about how J.C. told C.D. not to speak to her.

R.C. e-mailed D.D. on May 21, 2016 to document this alleged harassment of J.C. by C.D., and demand it cease. R.C. also attached a copy of the charge filed by the state nursing board against C.D., and asserted in the e-mail C.D. was a convicted felon, was sentenced to jail, and was determined by the State of California to be a public safety risk.

F. September 2016

On September 25, 2016, R.C. sent an e-mail to multiple neighbors of the parties entitled "Harassment of [R.C.] Family;

[C.D.] Declared by State of California 'Public Safety Risk.'" In the e-mail, R.C. complained that C.D. unfairly cast aspersions about him, and that C.D. had "been **declared a public safety risk by the State following her being convicted of felony drug charges.**" R.C. also attached copies of his July 4, 2014–May 21, 2015 e-mails to D.D., along with a copy of the charge filed by the nursing board against C.D. R.C. complained that D.D. failed to honor his commitment to take care of C.D.'s alleged behavior, and R.C. therefore "determined to disseminate the complete set of facts via Email to the neighborhood and related parties in the hope that such social consequence would halt her offensive and harassing behavior." R.C. further encouraged recipients of this e-mail to forward the e-mail to others.

After sending this e-mail to third parties, R.C. forwarded a copy to D.D., telling D.D. that R.C. would re-forward the e-mail string in the future to other neighbors if he heard anyone made false claims about the conflict between the R.C. and D.D. families, so that other neighbors would be informed of the "true background, history and character of [C.D.] or others sharing her family name."

G. May 31 – June 1, 2017

On May 31, 2017, a home in the parties' neighborhood was burglarized. C.D. was friendly with the victims, and walked over to their house to see if she could be of assistance. This required her to pass R.C.'s home. C.D. testified that as she walked by R.C.'s home, R.C. was in his yard and said in a loud voice "there's the drug addict." C.D. said she responded by asking R.C. to leave her alone. R.C. testified at the evidentiary hearing he was not speaking to C.D., but rather speaking to his wife over a walkie-

talkie about who may have burglarized the neighbors' home, and C.D. overheard him speculating to J.C. that the burglar was a drug addict.

After C.D. finished at the burglary victims' home, she walked back to her property. R.C. was still in his yard as she passed his property. C.D. told R.C. she thought the agreement was to leave her alone, and she asked to be left alone. C.D. testified R.C. responded with a diatribe in which he called C.D. disgusting and fat. At some point during the conversation, R.C. began recording the conversation. On the tape, R.C. can be heard saying "you look so old," "everybody talks about you," "go back to your wheelchair," "stupid old lady," "you're disgusting," "you're a drug addict," "you're a convicted drug felon," "they kicked you out of rehab," and "go back, and do some more drugs." The trial court heard C.D. say only "at least I got help" when the subject of rehab was discussed.[2] C.D. testified R.C.'s statement that she was kicked out of rehab was not true.

On June 1, 2017, the day after the taped discussion, R.C. e-mailed D.D. to document his version of the prior day's events. R.C. said he was not requesting D.D. stop C.D.'s behavior because it was clear he had little or no influence over her behavior. R.C. stated he felt sorry for D.D. and could not "imagine what it must be like having to live with a convicted drug felon so prone to this kind of erratic, anti-social behavior. . . ."

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[2] R.C. purports to cite a transcript of the recording, but the record is clear the trial court listened to the recording twice, relied on what it could hear (reciting those comments for the record), and disregarded the transcript to the extent the trial court did not independently hear a particular statement.

D.D. testified that he was "not as much" concerned with continued e-mails from R.C. as he was with R.C.'s statement on May 31, 2017 (as reported to him by C.D.) about a wheelchair, which D.D. perceived as a threat of physical violence towards his spouse to put her in a wheelchair.

PROCEDURAL HISTORY

On June 1, 2017, after sending his e-mail to D.D., R.C. sought and obtained a temporary civil harassment restraining order protecting himself against C.D.; R.C. requested his wife J.C. be added as an additional protected party, which the judicial officer reviewing the request granted. On June 16, 2017, D.D. sought and obtained a temporary civil harassment restraining order protecting himself against R.C.; D.D. requested his wife C.D. be added as an additional protected party, which the court granted.

On July 3, 2017, the trial court considered both restraining order petitions in a single evidentiary hearing. D.D. was represented by counsel. R.C. represented himself. The trial court made clear to the parties that it would consider only evidence presented during the hearing and not prior pleadings or attachments to them. The trial court heard testimony from R.C., J.C., D.D. and C.D., and considered the exhibits admitted during the hearing.

The trial court denied R.C.'s petition, finding he failed to prove his entitlement to a civil harassment restraining order by the required clear and convincing evidence. The trial court granted D.D.'s petition, and issued a restraining order protecting D.D. against R.C. for a term of five years. The trial court further granted D.D.'s request to include C.D. as an additional protected

party. The court found R.C. did not make any threat of violence, but did engage in a knowing and willful course of conduct directed towards D.D. and C.D. that seriously alarmed, annoyed and harassed them and would cause a reasonable person substantial emotional distress. Specifically, the court stated, "I don't know why there is a need to forward a chain of emails to say if you don't—basically, if you don't play ball, I'm going to somehow release this. It's not a secret. You're sort of bolstering [sic] about it. I'm going to release this information to the neighbors. If that's not harassment I don't know what is."

R.C. was ordered to stay 10 yards away from D.D., C.D., their home, cars and workplace. R.C. was further ordered not to "[h]arass, intimidate, molest, attack, strike, stalk, threaten, assault . . . , hit, abuse, destroy personal property of, or disturb the peace" of D.D. and C.D., and not to contact them either directly or indirectly in any way. The court informed R.C. that a violation of the order could become a criminal charge, and he therefore needed to be careful "because even an email that you think is not harmful by contacting [D.D. or C.D.] directly or indirectly by telling a neighbor, 'look at this chain of emails,' that could potentially be used against you in a future criminal action . . . ." R.C. then asked for clarification if he could e-mail third parties to express his opinion and include public documents. The court responded by reiterating the terms of its order, and refused to provide an advisory opinion about the potential consequences of R.C.'s future actions.[3]

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[3] R.C. asserts he has subsequently been criminally charged for violating the restraining order, based in part on these comments from the court. R.C. has sought to augment the record

Following the issuance of the restraining order, R.C. timely appealed the order issued against him.[4]

DISCUSSION

A. Standard of Review

When reviewing the issuance of a civil harassment restraining order, we look to see "whether the findings (express and implied) that support the trial court's entry of the restraining order are justified by substantial evidence in the record." (*R.D. v. P.M.* (2011) 202 Cal.App.4th 181, 188.) That means "[w]e resolve all factual conflicts and questions of credibility in favor [of] the prevailing party and indulge in all legitimate and reasonable inferences to uphold the finding of the trial court if it is supported by substantial evidence which is reasonable, credible and of solid value." (*Schild v. Rubin* (1991) 232 Cal.App.3d 755, 762 (*Schild*).)

Whether the facts, when construed most favorably in D.D.'s favor, are legally sufficient to constitute civil harassment under

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with filings from the pending criminal case against him. Those proceedings do not inform whether there was substantial evidence for the restraining order, or whether its terms violated the First Amendment, which are the arguments R.C. raises on appeal. Accordingly, we have denied the request to augment the record and have not considered those pleadings or statements in them. (*Vons Companies, Inc. v. Seabest Foods, Inc.*, *supra*, 14 Cal.4th at p. 444, fn. 3.) To the extent R.C. claims there are irregularities in the criminal proceeding against him, those issues are not before us in this appeal.

[4] R.C. did not appeal the trial court's denial of his request for a restraining order.

section 527.6 is a question of law subject to de novo review. (*R.D. v. P.M.*, *supra*, 202 Cal.App.4th at p. 188.)

B. Code of Civil Procedure Section 527.6[5]

Section 527.6, subdivision (a), provides that a victim of harassment "may seek a temporary restraining order and an order after hearing prohibiting harassment as provided in this section." Section 527.6, subdivision (b) defines "harassment" to include not just actual violence or threats of violence, but also "a knowing and willful course of conduct directed at a specific person that seriously alarms, annoys, or harasses the person," that serves no legitimate purpose, and that is not constitutionally protected activity. To constitute harassment, the course of conduct "must be that which would cause a reasonable person to suffer substantial emotional distress, and must actually cause substantial emotional distress to the petitioner." (§ 527.6, subd. (b)(3).)

C. Sufficiency of the Evidence

1. Waiver

We choose to address R.C.'s sufficiency challenge on the merits, despite D.D.'s claim that R.C. has waived this argument. The rules of court require an appellant like R.C. to provide a summary of the significant facts—not just the facts favorable to his position. (Cal. Rules of Court, rule 8.204, subd. (a)(2)(C).) A party challenging the sufficiency of the evidence, as R.C. does here, must summarize the evidence favorable *and* unfavorable, and show how and why the evidence is insufficient. (*Schmidlin v. City of Palo Alto* (2007) 157 Cal.App.4th 728, 738.) R.C. has done

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5 All statutory references are to the Code of Civil Procedure.

no such thing. His opening brief for the most part recites only R.C. and J.C.'s version of events, and omits any of the contrary evidence offered by D.D. and C.D.—in other words, the primary evidence on which the trial court relied in granting the restraining order against R.C. "Where a party presents only facts and inferences favorable to his or her position, 'the contention that the findings are not supported by substantial evidence may be deemed waived.' " (*Ibid*.)

We have independently reviewed the record, along with D.D.'s citations to contrary evidence. We decline to deem R.C.'s challenge waived, in particular because on the key issue of emotional distress, to which we turn next, R.C.'s briefing does in fact set forth the pertinent facts including D.D.'s testimony.[6]

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[6] The antipathy between the parties has unfortunately spilled over to their counsel, with both sides accusing the other of misrepresenting the record, making statements without record support, failing to follow court rules, and other alleged missteps along with accompanying requests for monetary sanctions against the other side. The parties filed over 260 pages of briefing disputing what occurred in a half-day evidentiary hearing. They then filed over 70 additional combined pages of sanctions motions disputing the accuracy of each other's appellate briefing disputing what occurred in the evidentiary hearing. One party then sought leave to file another motion for sanctions to dispute what was stated in other side's initial sanctions motion disputing the underlying briefing disputing what happened in the evidentiary hearing—permission that we denied lest this cycle continue ad infinitum. The multiple cross-requests for sanctions are denied.

2. There Was No Substantial Evidence D.D. Actually Suffered Substantial Emotional Distress

For an injunction to issue under section 527.6 based on a course of conduct theory, R.C. must have seriously alarmed, annoyed or harassed D.D. to such an extent that a reasonable person would suffer substantial emotional distress, and D.D. must have in fact suffered substantial emotional distress. (§ 527.6, subd. (b)(3).) D.D.'s evidence of emotional distress was a single statement that he was "not as much" concerned with continuing to receive e-mails from R.C. as he was about R.C.'s May 31, 2017 "wheelchair" statement to C.D., which D.D. understood from C.D.'s retelling to be a threat of physical violence. After finding no credible evidence that R.C. had threatened physical violence on May 31, 2017 or otherwise, and noting the statutory requirements with regard to emotional distress, the trial court stated: "I also understand that [D.D.] is pretty much taking a different position [than C.D.] on all this. I think it has gotten to him. I think he's trying to look past it. I think he's right, he's hoping over time this would go away, number one. Number two, I don't need, at least in my opinion, a quote, direct statement that he has suffered emotional distress. I do think that this threat, a constant chain of emails being broadcast against his wife, can't be allowed. And the standard is . . . whether this course of conduct that [R.C.] is engaged in would cause a reasonable person to suffer substantial emotional distress. I find that it does."

The trial court correctly noted it did not need a direct statement from D.D. to find that he suffered emotional distress. (*Ensworth v. Mullvain* (1990) 224 Cal.App.3d 1105, 1110–1111

[court properly concluded protected party suffered substantial emotional distress despite "no direct oral testimony of [protected party]'s emotional distress caused by the harassment"] (*Ensworth*).) While the trial court did not make an express finding D.D. suffered substantial emotional distress (instead referencing only the reasonable person requirement), such an express finding is not required and the granting of the injunction necessarily implies the court found D.D. in fact suffered substantial emotional distress. (*Id*. at p. 1112.)

Our inquiry is thus whether substantial evidence supported that implied finding. As the trial court noted, D.D. did not testify that he suffered substantial emotional distress, which is "highly unpleasant mental suffering or anguish 'from socially unacceptable conduct' [citation] which entails such intense, enduring and nontrivial emotional distress that 'no reasonable [person] in a civilized society should be expected to endure it.'" (*Schild*, *supra*, 232 Cal.App.3d at pp. 762–763.) Instead, D.D. said only that he had some unspecified level of concern about R.C.'s e-mails, which was less than his level of concern about what he understood was R.C.'s threat against C.D. of physical violence.[7]

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[7] D.D. additionally testified he was alarmed and concerned when C.D. relayed to him R.C.'s wheelchair comment. D.D argues his reaction is additional evidence of substantial emotional distress despite the trial court's finding that R.C. did not in fact threaten any violence. Given the court's finding that R.C. did not make any threats of violence, D.D.'s reaction to a purported threat the trial court found was not in fact made cannot be considered evidence of emotional distress. To the

Given the absence of any direct testimony, there must be meaningful other evidence of substantial emotional distress to support the issuance of the injunction. For example, the conduct in *Ensworth* included numerous harassing actions which in combination led the court to conclude the victim had suffered substantial emotional distress in the absence of direct testimony from the victim, including stalking, surveilling, numerous phone calls and threatening letters to the protected party, a threat to commit suicide in front of the protected party, and a threat that the harasser would repeatedly violate the restraining order to maintain contact. (224 Cal.App.3d at pp. 1107, 1110–111.)

Here, in contrast, D.D.'s interaction with R.C. was limited to a handful of e-mails over a three-year period (one of which was a forwarded e-mail sent to D.D.'s neighbors) containing false statements about C.D. and her interactions with the R.C. family, and insulting language about C.D.—e-mails that to D.D.'s credit he did his best to ignore in the hope R.C. would leave D.D. and C.D. alone. While D.D. was understandably concerned about R.C.'s actions towards his spouse (and so testified), and the trial court found based on its observations of D.D.'s demeanor and the other evidence before it that R.C.'s e-mails had "gotten to" D.D., these sporadic contacts, either alone or in combination with D.D.'s testimony about them, are not substantial evidence D.D. experienced the intense and enduring mental suffering or anguish required to support the issuance of a civil harassment restraining order based on a course of conduct theory.

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extent D.D. had such a reaction, it was from his wife's retelling of the incident and not what actually occurred.

Because we find a lack of substantial evidence that D.D. in fact suffered substantial emotional distress, we need not address R.C.'s other sufficiency challenges. Substantial emotional distress is a required element for the issuance of a civil harassment restraining order based on a course of conduct theory, and the lack of substantial evidence D.D. actually suffered such distress necessarily means the trial court erred in issuing a restraining order. (*Schild*, *supra*, 232 Cal.App.3d at p. 765 [failure of proof on one required element causes civil harassment restraining order to fail].)

C. Given the Lack of Substantial Evidence to Support the Restraining Order Requested by D.D., the Order Cannot Continue as to C.D.

R.C. argues that because the restraining order fails as to D.D., it likewise fails as to C.D. because she did not petition for a restraining order, but instead was listed only as an additional protected person on the order issued at D.D.'s request. We agree.

Section 527.6 proceedings involve two parties. The victim of harassment and party "to be protected by the temporary restraining order and order after hearing, and, if the court grants the petition, the protected person" is the "Petitioner." (§ 527.6, subd. (b)(4).) The person "against whom the temporary restraining order and order after hearing are sought and, if the petition is granted, the restrained person" is the "Respondent." (*Id.*, subd. (b)(5).) Section 527.6, subdivision (c) provides that "[i]n the discretion of the court, on a showing of good cause, a[n] . . . order after hearing issued under this section may include other named family or household members" in addition to Petitioner. In other words, if the court determines the

Petitioner's request is justified, and issues a restraining order, it can upon good cause include in that restraining order certain other family or household members affiliated with Petitioner. Pursuant to subdivision (c), D.D. argued (and the trial court agreed) there was good cause to include C.D.—who was not a petitioner in the proceeding below, nor a party to this appeal—as an additional protected person.

Because there was insufficient evidence to issue the restraining order in favor of D.D., that order must be dissolved. Because there is no longer an underlying order in favor of D.D., there is no order pursuant to which other named family or household members may be included along with the Petitioner pursuant to subdivision (c). If the trial court found D.D. had not carried his burden of proof to show substantial emotional distress and denied his request for a restraining order, it could not have issued a restraining order protecting only C.D., who was not a party and had not petitioned for a restraining order. (Cf. *Nora v. Kaddo* (2004) 116 Cal.App.4th 1026, 1029 [court cannot issue a restraining order pursuant to section 527.6 absent a formal written request by the party seeking the order].) That D.D. was found not to have carried his burden of proof by an appellate rather than a trial court does not change that result.

DISPOSITION

The civil harassment restraining order is reversed, and the injunction issued against R.C. is dissolved. Both parties are to bear their own costs and attorneys' fees on appeal.

NOT TO BE PUBLISHED

WEINGART, J.*

We concur:

ROTHSCHILD, P. J.

JOHNSON, J.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.